take leases in order to make up the shortfall in income. The purchasers sought to adduce evidence that in the course of negotiations both parties had 'commercial' leases in mind. Manson J said at p 606:

> This was said to be evidence of surrounding circumstances to which recourse could be had in interpreting the contract. In truth, the evidence is not evidence of surrounding circumstances; it is evidence of antecedent oral negotiations and expectations of the parties and as such it cannot be used for the purpose of construing the words of a written contract intended by the parties to comprehensively record the terms of the agreement which they have made.

Exceptionally, even if evidence of negotiations is admitted because the action raises a question of rectification, or misrepresentation, the court should not allow itself to be influenced by that evidence when it comes to construe the agreement. Naturally, this is difficult to achieve in practice.

In *Arrale* v *Costain Civil Engineer*,[6] Stephenson LJ suggested that evidence of negotiations could be admitted in order to clarify ambiguities. This suggestion was followed by Kerr J in *The 'Karen Oltmann'*[7] in the following terms:

> If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is being alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the word as the result of their common intention.

In the present case, the contract of guarantee and indemnity contains no ambiguity. Indeed, its provisions are crystal clear and comprehensive.

To revert to the specific issue before me, it is my opinion that the effect of admitting extrinsic evidence of the 'understanding' would be to vary or to contradict the terms of the guarantee and indemnity and this would fall foul of the provisions of ss 91 and 92.

If, contrary to my primary opinion such extrinsic evidence is admissible, there is nothing to suggest that the manager concerned possessed actual or ostensible authority to make the representations alleged on behalf of the plaintiffs so that even if such representations had been made it would not have been binding upon the plaintiffs. It is noteworthy that nowhere in the affidavits filed on behalf of the defendants or even during the argument was such authority alleged.

It follows that, the contract of guarantee and indemnity does not require the plaintiffs to first take action against the customer by enforcing the charge before proceeding against the defendants. (See *Malaysian International Merchant Bankers Bhd* v *G & C Securities Sdn Bhd.*[8])

In the circumstances, I was satisfied that there was no defence to the action worth listening to and so I made an order in terms of the application against all the defendants.

Application allowed.

Solicitors: *Johari Ahmad & Tan; Ooi Lee & Co.*

Reported by *Kevin Mathews*

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING UP) NO D1-42-577-1987
VC GEORGE J
3 NOVEMBER 1989

Companies and Corporations — Winding up — Application to set aside petition — Whether petitioner qualified to present petition — Debt disputed on substantial grounds — Company's liability to petitioner the subject of pending proceedings in another jurisdiction — Companies Act 1965, s 217(1)

The petitioner was the guarantor of a loan made to a company. The agreement between the parties, pursuant to which the guarantee had been provided, stated that if the petitioner informed the company that the lender required the petitioner to pay the amount guaranteed, the company should on demand pay this amount to the petitioner. At the petitioner's request, the lender sent a written demand to the petitioner for repayment of the loan. The petitioner in turn served the company with a statutory demand for payment and upon the company's failure to pay, presented a petition for winding up. The company applied for the petition to be set aside as the alleged debt was disputed on substantial grounds, namely: (a) the demand made by the lender to the petitioner was improper and invalid as it was made only at the petitioner's request; (b) there was in existence an agreement, entered into with the petitioner's consent, which created a moratorium in respect of loans to the company.

Held, allowing the company's application:

(1) In a creditor's petition for a winding-up order, the petitioner has to satisfy the court that it is indeed a creditor and as such, a qualified person to present the petition and that a ground for winding up exists.

(2) The petition is based on a debt to which the petitioner claims to be immediately and unconditionally entitled. This is confirmed by the statutory demand having been made. A debt which will become payable only at some time in the future is not capable of being made the subject of a statutory demand.

(3) The effect of the company's contentions amounts to there being a dispute on substantial grounds as to whether the petitioner is a creditor qualified to present the petition. Further, as the issue of whether the company is liable to the petitioner is the subject of a contested action in the High Court of Singapore, which was pending at the date of presentation of the petition, the petition ought to be set aside or stayed pending the disposal of these issues. The company court is not a suitable forum for the adjudication of such controversial issues.

Cases referred to

1 *Re European Life Assurance Society* (1869) 9 LR Eq 122 (refd)
2 *Re North Bucks Furniture Depositories Ltd* [1939] 2 All ER 549 (refd)
3 *Re Portman Provisional Cinemas Ltd* (1964) 108 SJ 581 (refd)
4 *Re LHF Wools Ltd* [1970] 1 Ch 27 (refd)
5 *Morgan Guaranty Trust Co of New York* v *Lian Seng Properties Sdn Bhd* [1989] 3 MLJ 172 (refd)

Legislation referred to

Companies Act 1965 s 217(1)

CT Khaw for the petitioner.
MS Murthi for the respondent.

Cur Adv Vult

VC George J: The petitioner presented the petition herein on 10 December 1987 to have the respondent company ('the company') wound up. The petitioner claimed to be a creditor of the company, it being contended that the company was indebted to it in the sum of $33,323,593.91.

American International Assurance Co Ltd ('AIA') had lent the company $30,000,000 the repayment of which together with interest and costs was guaranteed by the petitioner. Clause 5.2 of the agreement between the company and the petitioner pursuant to which the petitioner had provided the guarantee was to the effect that if the guarantor notified the company that AIA had required the guarantor to pay any part of the amount guaranteed, the company should forthwith on demand pay such amount to the guarantor whether or not the guarantor had paid off AIA and notwithstanding that the sum called for might not have been properly due.

By a letter of 23 September 1987, written purportedly pursuant to the guarantee, AIA demanded of the petitioner payment of $33,323,593.91 made up of the said $30m, interest and costs. It would appear however that the said demand was made because the petitioner had required AIA to make the demand. No doubt because of the peculiarity of that requirement and perhaps for other reasons which need not be gone into here, that it was because the guarantor had required them to do so that it was making the demand was placed on record by AIA in the letter of demand.

Predictably, after receipt of that letter of demand sent to them at their instance, the petitioner purported to invoke the said cl 5.2 and demanded of the company payment of the said amount. The company refused and in any event failed to pay the amount demanded or at all.

The petitioner says that a statutory demand for the amount was served on the company on 18 November 1987, and it not having been met within the prescribed three weeks, it is contended that there is a presumption that the company is unable to pay its debts. The petitioner also says that there were other defaults on the part of the company that entitled the petitioner to invoke cl 10.01(i) of the guarantee which called for the payment of the said amount by the company. This does not appear to be seriously pursued. What the defaults were are not specified in the petition. The petitioner also points out (the relevance of which is not clear) that the company had net current liabilities of some $6m as at 31 December 1985 which increased to some $37m as at 31 December 1986. As at 31 December 1985, it had made a profit of just over $1m whereas in 1986 it incurred a loss of some $11m. The company took out its motion (encl (11)) by which it asked for the petition to be set aside on the ground that the petitioner was not qualified to be a petitioner, it being contended that the alleged debt was disputed on substantial grounds.

In a creditor's petition for a winding-up order, which this petition purports to be, the petitioner has to satisfy the court that it is indeed a creditor and as such a qualified person to present the petition and that a ground for winding up exists. 'Creditor' in s 217(1) of the Companies Act 1965 includes 'a contingent or prospective creditor'. Accordingly a creditor's petition may be presented by not only a person who at the time of presenting the petition has an unconditional right to immediate payment of the debt upon which the petition is formed (see *Re European Life Assurance Society*[1]) but also a contingent or prospective creditor. The words 'contingent or prospective creditor' are not defined in the Act. *McPherson on The Law of Company Liquidation* (3rd Ed) at p 44 says of those words:

> The critical words are undefined, but in *Re William Hockley Ltd* [1962] 1WLR 155 Pennycuick J expressed the view that 'contingent creditor' must be taken to denote 'a person towards whom, under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future date'. In *Community Development Pty Ltd* v *Engwirda Construction Company* (1969) 120 CLR 455 this definition was accepted and applied to the case of a petitioner whose entitlement to payment under an existing building contract with the company was dependent on final certification, which had not taken place at the time when the petition was presented. Nicholson J extended the accepted meaning of the term 'contingent creditor' in *Re Gasbourne Pty Ltd* (1984) 2 ACLC 103 to include a person who has an arguable claim against the company, whether the claim is for unliquidated damages or otherwise. A prospective creditor has been described as one who is indebted in a sum of money not immediately payable.

The learned author of *McPherson* goes on to say at p 45 that the best test for determining who is entitled to petition for a winding-up order in the capacity of creditor is that suggested by Crossman J in *Re North Bucks Furniture Depositories Ltd*,[2] namely, that the term 'creditor' includes every person entitled to prove in winding up. In other words, the petition may be presented by one whose debt was enforceable at the time of presentation of the petition.

In the instant case, the petition is based on a debt to

which the petitioner claims to be immediately and unconditionally entitled. It does not hold itself to be a contingent or prospective creditor. That that is so is confirmed by the statutory demand having been made. A debt which will become payable only at some time in the future is not capable of being made the subject of a statutory demand — see *McPherson* (3rd Ed) at bottom of p 51 and top of p 52. The petitioner's claim to immediate and unconditional payment appears to be based on the invocation of the said cl 5.2.

However the company disputes the validity of the invocation of cl 5.2. First it contends that it was stage managed in that the condition precedent to the invocation of the clause, namely, AIA requiring the petitioner guarantor to pay up the amount was at the behest of the petitioner and as such was improper and invalid. It further contends that AIA (with the consent of the petitioner), together with certain other institutions that had lent money to the company, had entered into what has been referred to as the sharing formula agreement by which a moratorium in respect of claims against the company by AIA and the other lending institutions was created, which it contends was only lifted on the due termination of the sharing formula agreement on 2 February 1988, well after the date of presentation of the petition. In effect it contends that in the face of the moratorium and as it was created with the consent of the petitioner, the invocation of cl 5.2 by the petitioner was not valid.

That it was at the request of the petitioner that AIA required the petitioner to make the payment is not denied. That there was the sharing formula agreement is not denied. That the sharing formula agreement was entered into by AIA with the consent of the petitioner is not denied. And it does appear not improbable that on a true construction of the sharing formula agreement, there was a moratorium as alleged by the company. In my judgment, the effect of all that amounts to there being a dispute on substantial grounds in respect of the petitioner's contention that it is a creditor qualified to present the petition. Whether, in any event, the petitioner can be said to be a contingent or prospective creditor is also debatable.

In fact it has been revealed that the issue of whether the company is liable to the petitioner in the said amount of $33,323,593.91 or at all is the subject of a contested action in the High Court at Singapore brought against the company by the petitioner some time before the presentation of the instant petition and it is not denied that that suit was pending as a contested action as on 10 December 1987, the date of presentation of the petition.

Everybody knows that the company court is not a suitable forum for the adjudicating of such controversial issues and particularly as there is the suit in the Singapore High Court brought at the instance of the petitioner some time prior to the presentation of the petition where the liability of the company to the guarantor has been put in issue, it seems to me that the petition ought to be set aside or stayed pending the disposal of these issues or set aside. Even where the debt on which the petition was admitted but because there was what appeared to be a genuine cross-claim with substance in it, the English Court of Appeal was of the opinion that the cross-claim should be left to be tried in the Queen's Bench Division and that the petition should be rejected — see *Re Portman Provisional Cinemas Ltd*[3] which was followed in *Re LHF Wools Ltd*[4] and by me in my judgment delivered on 23 June 1989 herein reported as *Morgan Guaranty Trust Co of New York* v *Lian Seng Properties Sdn Bhd*.[5] The relevant passage in *Re LHF Wools Ltd*[4] is from the judgment of Harman LJ at p 36B:

> The company appeals on the ground that according to modern practice if there is a genuine cross-claim, it is just as if there was a disputed debt; and, as everybody knows, a disputed debt is never good subject-matter for a petition.
>
> The main support for that proposition is *In Re Portman Provincial Cinemas Ltd* (1964) 108 SJ 581, a case in which I myself was one of the judges and the majority, consisting of myself and Russell LJ decided, Lord Denning MR dissenting, that the petition should be rejected. The difference was on what was the right view of the facts about the cross-claim in that case. We all agreed on what the law was, and Lord Denning MR stated it like this:
>
> 'As I understand the law on the matter, it is this: if this is a genuine cross-claim with substance in it, then let it be tried out in the Queen's Bench Division; this petition must be rejected. But if there is no substance in the cross-claim, then let the court do justice to the petitioners in this case and not give heed to so insubstantial a cross-claim.'
>
> I used much the same language myself, and so did Russell LJ. The majority decided in that case that, shadowy as the cross-claim was and improbable as the events said to support it seemed to be, there was just enough to make the principle work, namely, that it was right to have the matter tried out before the axe fell.

In the circumstances, I am far from satisfied that the petitioner was at the material time qualified to petition the court as it did.

There are a number of other parties, two of whom have indicated a desire to be substituted as petitioners in the event the court holds that the petitioner herein was not qualified to have presented the petition. However, it would appear that the company intends to challenge the right of each of those intending petitioners to be substituted.

In all the circumstances and particularly having in mind the long road that this petition has travelled, I think in the interest of all concerned, including other creditors,

the proper and expedient thing to do is not to entertain applications for substitution but to leave it to those interested to do so to present a fresh petition. The petition is set aside with costs.

Petition set aside.

Solicitors: *Allen & Gledhill; Murthi & Partners.*

Reported by *Michele Rasanayagam*

Chong Chin Shoong v Development & Commercial Bank Bhd

HIGH COURT (IPOH) — BANKRUPTCY NO 43-636-88
ABDUL MALEK J
24 OCTOBER 1989

Bankruptcy — Annulment and rescission of adjudication order and receiving order — Validity of bankruptcy notice — Amount of interest stated due — Whether the ruling of the Supreme Court would affect all adjudication orders and receiving orders given before its decision — Debt paid in full after adjudication order and receiving order — Bankruptcy Act 1967, s 3(1)(i)

The respondent had obtained judgment against the applicant as guarantor to Blue Chips Sdn Bhd ('BCSB'). The bankruptcy notice dated 30 June 1988 based on that judgment was served on the applicant on 8 July 1988 and demanded payment of $10,663.79 together with interest at the rate of 18% pa on monthly rests from 18 April 1987 to the date of payment and costs of $350.50. On 28 February 1989, the adjudication order and receiving order was granted in respect of $10,952.50 together with interest and costs ('the first debt'). On 29 March 1989, the respondent filed a proof of debt against the applicant in respect of $1,059,211.84 as at 28 February 1989 ('the second debt') which had arisen from banking facilities granted by the applicant to one CCS Sdn Bhd of which the respondent director had guaranteed the debt with two others. However, in view of the adjudication order and receiving order granted on 28 February 1989, no legal proceedings were taken against the applicant. On 12 July 1989, BCSB paid the respondent $13,919.85. The applicant applied to have the adjudication order and receiving order made against him annulled and rescinded.

Held, granting the application:

(1) The bankruptcy notice was invalid by virtue of the existing law as restated in *Ghazali*'s case[2] rendering the whole proceedings a nullity.

(2) Where the amount of interest due is calculable, it need not be quantified and it was sufficient just to state the rate of interest and the period such interest was repayable.

(3) The bankruptcy notice is void ab initio and the whole bankruptcy proceedings a nullity irrespective of whether the application to set aside is made before or after the adjudication order and receiving order.

(4) The fact that proof of a second debt had been filed against the applicant by the respondent is totally irrelevant as the whole proceedings are a nullity.

(5) The fact that the first debt had been paid by BCSB in full did not render the bankruptcy notice valid in the circumstances nor does it estop the applicant from making this application.

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 02-396 of 1989.]

Cases referred to

1 *Low Mun* v *Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 (folld)
2 *Ghazali bin Mat Noor* v *Southern Bank Bhd and four other appeals* [1989] 2 MLJ 142 (folld)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)

Christina Chia Li Eng (Miss) for the applicant.
Leslie TL Yeap for the respondent.
N Dharmasegaran for the Official Assignee.

Cur Adv Vult

Abdul Malek J: The judgment debtor had applied by way of notice of motion filed on 21 July 1989 for an order under s 105 of the Bankruptcy Act 1967 (hereinafter 'the Act') for the adjudication order and receiving order made against him on 28 February 1989 to be annulled and rescinded on the grounds that the bankruptcy notice filed on 18 June 1988 was void ab initio in consequence of which any other debt against the judgment debtor would become irrelevant, and because the sum under the bankruptcy notice had in any case been paid in full after the date of the adjudication order and receiving order.

In his supporting affidavit, the judgment debtor had averred that the judgment creditor had obtained judgment against him as guarantor to Blue Chips Sdn Bhd (hereinafter 'BCSB') vide Ipoh Sessions Court case 62-404-87 on 30 July 1987. The bankruptcy notice dated 30 June 1988 based on that judgment was served on him on 8 July 1988 and had demanded payment of $10,663.79 together with interest at the rate of 18% pa on monthly rests from 18 April 1987 to the date of payment and costs of $350.50. On 12 July 1989, BCSB had paid the judgment creditor $13,919.85.

Vide their affidavit filed on 30 August 1989, the manager of the judgment creditor had stated that the adjudication order and receiving order had been granted on 28 February 1989 because the judgment debtor had failed to pay the $10,952.50 together with the interest and costs (hereinafter 'the first debt'). On 29 March 1989, the judgment creditor had filed a proof of debt against the judgment debtor in respect of $1,059,211.84 as at 28 February 1989 (hereinafter 'the second debt'). The second debt had arisen from banking facilities granted by the judgment creditor to one CCS Sdn Bhd of which the judgment debtor's director had guaranteed the debt with two others. However, in view of the adjudication order and receiving order granted on 28 February 1989 as regards the first debt, legal proceedings against the judgment debtor on the second debt had not been proceeded